# STATE OF MICHIGAN

# COURT OF APPEALS

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ROBERT RAWSKI, JR., Personal Representative of the Estate of ROBERT RAWSKI, SR., Deceased,

Plaintiff-Appellee,

v

JACQUELINE KNIGHT and NATURAL FREEDOM, INC.,

Defendants-Appellants.

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UNPUBLISHED
March 27, 2007

No. 266851
Macomb Circuit Court
LC No. 04-005022-NI

Before: Jansen, P.J., and Neff and Hoekstra, JJ.

PER CURIAM.

Defendants Jacqueline Knight and Natural Freedom, Inc., appeal by leave granted the trial court's order compelling Knight to execute medical authorizations for the release of her medical records and requiring that she submit to an independent medical examination (IME). We reverse.

Plaintiff's decedent, Robert Rawski, Sr., was struck and fatally injured by a car being driven by Knight while en route to a work-related appointment. Plaintiff brought this wrongful death action alleging that Knight drove her vehicle in a negligent manner, and that this negligence proximately resulted in the death of plaintiff's decedent. At her deposition, Knight denied having seen the decedent until after he struck the windshield of her vehicle. Knight also disclosed that she suffered from sleep apnea, and plaintiff's counsel observed that she had a very pronounced "wandering" eye. Plaintiff thereafter moved to compel Knight to authorize the release of her medical records and to submit to an IME. After summarizing plaintiff's theory in support of this motion as being "that [Knight]'s sitting behind the wheel sound asleep and she's got bad vision," the trial court concluded that plaintiff properly could obtain Knight's medical records and require that she submit to an IME to determine whether she "is inclined to have those kind of difficulties."

On appeal, defendants argue that disclosure of Knight's medical records is precluded by the physician-patient privilege, MCL 600.2157, and that Knight did not waive this privilege.[1] We agree. "The application of the physician-patient privilege is a legal question that this Court reviews de novo. Once we determine whether the privilege is applicable to the facts of this case, we determine whether the trial court's order was proper or an abuse of discretion." *Baker v Oakwood Hosp Corp*, 239 Mich App 461, 468; 608 NW2d 823 (2000).

The trial court did not explain its reasoning but suggested that it granted plaintiff's motion to compel because it believed that Knight's medical records and an IME could produce relevant evidence. Even if relevant, however, privileged matters are not generally subject to discovery. *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 37; 594 NW2d 455 (1999). MCR 2.302(B)(1) provides that "[p]arties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action, . . . ." Thus, the perceived relevance of the medical records was not a basis for compelling Knight to produce them. As this Court observed in *Navarre v Navarre*, 191 Mich App 395, 399; 479 NW2d 357 (1991), "[a]ll privileges exist at the expense of suppressing valuable evidence. Indeed, were this not the case, there would be no need for privileges at all."

Further, we disagree with plaintiff's contention that Knight waived the physician-patient privilege. MCL 600.2157 provides, in pertinent part:

> Except as otherwise provided by law, a person duly authorized to practice medicine or surgery shall not disclose any information that the person has acquired in attending a patient in a professional character, if the information was necessary to enable the person to prescribe for the patient as a physician, or to do any act for the patient as a surgeon. *If the patient brings an action against any defendant to recover for any personal injuries, or for any malpractice, and the patient produces a physician as a witness in the patient's own behalf who has treated the patient for the injury or for any disease or condition for which the malpractice is alleged, the patient shall be considered to have waived the privilege provided in this section as to another physician who has treated the patient for the injuries, disease, or condition*. [Emphasis added.]

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[1] Plaintiff asserts that Knight's employer, defendant Natural Freedom, Inc., lacks standing to challenge the trial court's ruling on appeal, given that the physician-patient privilege belongs to the patient and can be waived only by the patient. *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 34; 594 NW2d 455 (1999). We conclude that plaintiff waived this argument by failing to challenge Natural Freedom's standing to join with Knight in arguing the issue below. See *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n*, 264 Mich App 523, 527; 695 NW2d 508 (2004). In any event, in light of plaintiff's claim that Knight's medical condition was relevant to Natural Freedom's level of fault in allowing Knight to drive to her appointment, we are satisfied that Natural Freedom was sufficiently aggrieved by the trial court's decision to afford it standing to join with Knight in challenging the trial court's order granting plaintiff's motion to compel. See *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 290; 715 NW2d 846 (2006).

The privilege afforded by § 2157 belongs to the patient and can be waived only by the patient. *Dorris*, *supra* at 34. "A patient may intentionally and voluntarily waive the privilege," or may "impliedly waive the privilege as specifically provided for with § 2157." *Id*. at 39.

In the instant case, Knight did not bring "an action against any defendant to recover for any personal injuries, or for malpractice," nor did she produce a physician as a witness in her behalf. Thus, the "patient-litigator exception" set out in § 2157 does not apply, *Landelius v Sackellares*, 453 Mich 470, 474-475; 556 NW2d 472 (1996), and Knight did not impliedly waive her privilege under the statute.

Apart from § 2157, plaintiff also relies on various court rules, including MCR 2.314(B)(1), to argue that Knight waived the physician-patient privilege. MCR 2.314(B)(1) provides:

> A party who has a valid privilege may assert the privilege and prevent discovery of medical information relating to his or her mental or physical condition. The privilege must be asserted in the party's written response to a request for production of documents under MCR 2.310, in answers to interrogatories under MCR 2.309(B), before or during the taking of a deposition, or by moving for a protective order under MCR 2.302(C). A privilege not timely asserted is waived in that action, but is not waived for the purposes of any other action.

Our Supreme Court discussed the applicability of this, and other rules pertinent to discovery and the physician-patient privilege, in *Landelius*, *supra* at 475:

> In addition to the statutory privilege of MCL 600.2157[,] . . . the Michigan Court Rules contain a number of discovery provisions that are relevant to this discussion. For instance, MCR 2.302(B) says that parties to an action may obtain discovery of any relevant matter that is not privileged. Under MCR 2.314(B)(1), a party who does not timely assert a privilege in a written response for documents under MCR 2.310 is held to have waived the privilege for purposes of the case at hand, although it "is not waived for the purposes of any other action." So, too, a party who does not assert the privilege at the deposition of a witness loses the privilege in that action under MCR 2.306(D)(4), with regard to that testimony.

Here, Knight did not waive the privilege by failing to assert it in a written response for documents under MCR 2.310. A "request" for documents under MCR 2.310 must be served on the defendant, must list the items to be provided, and must specify a reasonable time, place, and manner of making the inspection. See MCR 2.310(B)(1) and (C). In this case, the first formal request for documents was made in plaintiff's motion to compel, which defendants timely answered, invoking the physician-patient privilege.

Nor did Knight voluntarily waive the physician-patient privilege at her deposition. "A true waiver is an intentional, voluntary act and cannot arise by implication. It has been defined as the voluntary relinquishment of a known right." *Kelly v Allegan Circuit Judge*, 382 Mich 425, 427; 169 NW2d 916 (1969). The physician-patient privilege is not casually waived. *Id*. Knight did not assert her physician-patient privilege before or during her deposition. However, she also

did not describe any symptoms or medical care. Knight testified that she did not require corrective lenses for driving, and that she had not had an eye examination in over two years. Although she also testified that she was "on a machine" for sleep apnea, she was not asked and did not testify regarding the specifics of her condition. Knight was not required to invoke the privilege until it was clear that plaintiff was attempting to obtain privileged information. That effort did not become clear until plaintiff filed his motion to compel. Thus, there was no waiver of the privilege. Accordingly, the trial court abused its discretion in compelling Knight to sign medical authorizations for the release of her medical records. *Baker*, *supra*.

Defendants also argue that Knight's medical condition was not in controversy for purposes of compelling Knight to submit to an IME under MCR 2.311. Again, we agree.

MCR 2.311 provides, in relevant part:

> When the mental or physical condition . . . of a party . . . is in controversy, the court in which the action is pending may order the party to submit to a physical or mental or blood examination by a physician (or other appropriate professional) or to produce for examination [a] person in the party's custody or legal control. The order may be entered only on motion for good cause with notice to the person to be examined and to all persons.

Plaintiff makes the conclusory claim that either Knight's vision must have been impaired or she must have been fatigued because she did not see the decedent before she struck him. However, plaintiff failed to make an affirmative showing of any evidence indicating that visual impairment or fatigue played a role in the accident, which plaintiff does not appear to dispute occurred while the decedent was walking along a darkened road late at night and while wearing dark clothing. We therefore conclude that the trial court erred to the extent that it relied on MCR 2.311 as a basis for compelling Knight to submit to an IME.

Reversed.

/s/ Kathleen Jansen
/s/ Janet T. Neff
/s/ Joel P. Hoekstra